Supreme Court, U.S.
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No. 96-730

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1996

DOROTHY L. ALDRICH, et al.,

Petitioners,

v.

GENERAL PUBLIC UTILITIES CORP., METROPOLITAN EDISON CO., JERSEY CENTRAL POWER & LIGHT CO., PENNSYLVANIA ELECTRIC CO., BABCOCK & WILCOX CO., MCDERMOTT INCORPORATED, RAYTHEON CONSTRUCTORS, INC., BURNS & ROE ENTERPRISES, INC. AND DRESSER INDUSTRIES, INC.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

RESPONDENTS' BRIEF IN OPPOSITION

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QUESTION PRESENTED

In 1988 Congress amended the Price-Anderson Act, creating a federal cause of action for persons claiming injury as a result of a nuclear accident, and specifying that rules of decision in such actions were to be derived from the law of the State in which the nuclear accident occurred. Was it a violation of the Constitution for Congress to specify as part of that enactment that the new federal remedy would apply to all such claims, including those arising out of events which had occurred before 1988, when the consequence was that plaintiffs, suing on account of a March 28, 1979 nuclear accident in Pennsylvania, who were present in Pennsylvania during or following that accident, had the timeliness of their claims measured by Pennsylvania's statute of limitations?

PARTIES TO THE PROCEEDING

The Petitioners are: Dorothy L. Aldrich, Faith Alleman, Philip Angeli, Michael J. Anoka, Ruth V. Anoka, Catherine J. Balinosky, Regis E. Beasley, Louis Borda, Betty M. Boylestein, George L. Boylestein, Shirlean Burhanan, Ruth Butler, Frank J. Caka, Susan H. Chynoweth, Daniel M. Chynoweth, Catherine Costello, John T. Costello, Martha A. Costik, Richard N. Costik, Mary Marguerite Earhart, Edward T. Ferguson, Marco G. Glad, Jr., Linda I. Glad, Barbara Grandon, Helen M. Hank, Edward John Hertzog, Marie H. Hertzog, Dianne Hindermyer, George Vance Hitz, Marjorie B. Hitz, Caryl C. Hoch, Louis A. Hoch, Estate of Robert P. Holmes, Thelma M. Nagy, Barry Obercash, Georgeann Pristello, James J. Pristello, Jamie Lynn Pristello, Kenneth R. Snyder, Patricia Southard, Joseph F. Stewart and Charlotte Evelyn Stewart.

The Respondents are identified below, together with the information required by Rule 29.6:

GPU, Inc. (formerly General Public Utilities Corp.)
Parent: N/A
Subsidiaries Not Wholly Owned: O.L.S. Power L.P.; Brooklyn Energy L.P.; Prime Energy L.P.; Onondaga Cogeneration L.P.; Empress Guaracachi S.A.; Solaris Power; Avon Energy Partners Holdings

Metropolitan Edison Company
Parent: GPU, Inc.
Subsidiaries Not Wholly Owned: Saxton Nuclear Experimental Corp.

Jersey Central Power & Light Company
Parent: GPU, Inc.
Subsidiaries Not Wholly Owned: Saxton Nuclear Experimental Corp.

Pennsylvania Electric Company
Parent: GPU, Inc.
Subsidiaries Not Wholly Owned: Saxton Nuclear Experimental Corp.

The Babcock & Wilcox Company

Parent: Babcock & Wilcox Investment Company

Subsidiaries Not Wholly Owned: Abahsain Hudson Heat Transfer Co., Ltd.; Asea Babcock; Babcock & Wilcox Services, Inc.; Babcock-Ultrapower Jonesboro; Babcock-Ultrapower West Enfield; Diamond Power Specialty Limited; Ebensburg Investors Limited Partnership; Ebensburg Power Company; Especialidades Termomecanicas, S.A. DE C.V.; Maine Power Services; North American CWF Partnership; North County Operations Associates; Palm Beach Energy Associates; South Point CWF; Sunnyside Operations Associates L.P.

McDermott Incorporated

Parent: McDermott International, Inc.

Subsidiaries Not Wholly Owned: Chiyoda Hudson International Inc.; Construcciones Maritimas Mexicanas, S.A. DE C.V.; Delta Catalytic Saudi Arabia Ltd.; DynMcdermott Petroleum Operations Company; McDermott Engineers & Constructors (Canada) Ltd.; PDC Mantenimiento, S.A.; Tiger Sulphur Operations Ltd.; Trispec Technical Services Ltd.; Universal Fabricators Incorporated

Raytheon Constructors, Inc.

Parent: Raytheon Constructors International, Inc.

Subsidiaries Not Wholly Owned: N/A

Burns & Roe Enterprises, Inc.

Parent: Roe Enterprises, Inc.

Subsidiaries Not Wholly Owned: Burns & Roe Worly, Limited; Lin & Roe Co., Ltd.

Dresser Industries, Inc.

Parent: N/A

Subsidiaries Not Wholly Owned: Subsea Underwater Associates, Inc.

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

RESPONDENTS' BRIEF IN OPPOSITION

The respondents respectfully request that this Court deny the petition for a writ of certiorari, seeking review of the Third Circuit's judgment and opinion in this case, reported at 89 F.3d 1106 (3d Cir. 1996).

STATUTES INVOLVED

42 U.S.C. § 2210(n)(2) (as amended by Section 11(a) of the Price-Anderson Amendments Act of 1988, Pub. L. 100-408, 102 Stat. 1066, 1076 (1988)) provides:

> With respect to any public liability action arising out of or resulting from a nuclear incident, the United States district court in the district where the nuclear incident takes place or in the case of a nuclear incident taking place outside the United States, the United States District Court for the District of Columbia, shall have original jurisdiction without regard to the citizenship of any party or the amount in controversy. Upon motion of the defendant or of the commission, or the Secretary, as appropriate, any such action pending in any State court (including any such action pending on August 20, 1988) or United States district court shall be removed or transferred to the United States district court having venue under this subsection. Process of such district court shall be effective throughout the United States. In any action that is or becomes removable pursuant to this paragraph, a petition for removal shall be filed within the period provided in section 1446 of title 28, or within the 30-day period beginning on August 20, 1988, whichever occurs later.

42 U.S.C. § 2014(hh) (as amended by § 11(b) of the Price-Anderson Amendments Act of 1988, Pub. L. 100-408, 102 Stat. 1066, 1076 (1988)) provides:

> The term "public liability action," as used in section 2210 of this title, means any suit asserting public liability. A public liability action shall be deemed to be an action arising under section 2210 of this title, and the substantive rules for decision in such action shall be derived from the law of the State in which the nuclear incident involved occurs, unless such law is inconsistent with the provisions of such section.

Section 20(b) of the Price-Anderson Amendments Act of 1988, Pub. L. 100-408, 102 Stat. 1066, 1084 (1988) (codified as a note to 42 U.S.C. § 2014 ("Effective Dates")), provides:

> The amendments made by Section 11 shall apply to nuclear incidents occurring before, on, or after the date of the enactment of this Act.

STATEMENT OF THE CASE

Petitioners, plaintiffs below, are individuals who were in Pennsylvania near the Three Mile Island nuclear plant in central Pennsylvania during or following the March, 1979 accident at that plant. Petitioners claim that their various illnesses were caused by radioactive gases released in that accident.

Pennsylvania has a two year statute of limitations for personal injury claims, which begins to run from the time a plaintiff has reason to know of both his injury and its alleged cause. Each plaintiff commenced an action in Pennsylvania, but more than two years after their asserted injuries were manifest. As a "protective" measure, Petition at 2, each plaintiff also filed actions in Mississippi state and federal courts, seeking to take advantage of Mississippi's six year limitations period.[1]

Subsequent to the filing of plaintiffs' various actions, Congress enacted the Price-Anderson Amendments Act of 1988, Pub. L. 100-408, 102 Stat. 1066 (1988) ("Amendments Act"). The Amendments Act created a federal cause of action for any claim that an injury resulted from the radiation hazard at a federally licensed nuclear facility, and directed that in such actions, the substantive rules of decision "shall be derived from the law of the State in which the nuclear incident involved occurs." 42 U.S.C. § 2014(hh). [2]

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1. At the time, Mississippi courts had interpreted the Mississippi borrowing statute as permitting application of Mississippi's six year limitations period to claims on behalf of out-of-state plaintiffs against out-of-state defendants on out-of-state causes of action, so long as the defendant was registered to do business in Mississippi. *See Louisiana & Mississippi R. Transfer Co. v. Long*, 159 Miss. 654, 667, 131 So. 84, 88 (1930); *see also Cowan v. Ford Motor Co.*, 719 F.2d 785 (5th Cir. 1983). That interpretation has since been rejected by the Mississippi legislature. *See* Miss. Code Ann. § 15-1-65 (1996); *Patton v. Mack Trucks*, 556 So.2d 679, 680 n.1 (Miss. 1989).

2. Congress' stated purpose in creating a federal cause of action, and in specifying that all claims arising out of the same accident would be subject to the same rules of decision, was to assure efficiency and fairness in the disposition of all such claims. *See* S. Rep. No. 218, 100th Cong., 1st Sess. 13 (1987), *reprinted in* 1988 U.S.C.C.A.N. 1476, 1488; *In re TMI Cases Consolidated II*, 940 F.2d 832, 857 (3d Cir. 1991), *cert. denied sub nom. Gumby v. General Public Util. Corp.*, 503 U.S. 906 (1992).

Petitioners' grievance is that Congress expressly stated that the Amendments Act, in these particulars, would have retroactive applicability to claims — such as these — arising out of "nuclear incidents occurring *before* . . . the date of enactment of this Act." Pub. L. 100-408, § 20(b), 102 Stat. 1066, 1076 (1988) (codified as a note to 42 U.S.C. § 2014) (emphasis added). As a consequence of that congressional choice, petitioners lost any "protective" cover from their forum shopping trip to Mississippi.[3]

The Amendments Act required defendants to act within 30 days if they wished to remove pending actions pursuant to the Act, and defendants did so. The state court cases (both Mississippi and Pennsylvania) were removed directly to the Middle District of Pennsylvania, and the federal cases in Mississippi were transferred to that court. Defendants moved for summary judgment based on the Pennsylvania statute of limitations.[4] Both the District Court and the Court of Appeals determined that plaintiffs' claims were too late under Pennsylvania's limitations statute, and both rejected plaintiffs' contention that Congress could not constitutionally require that the timeliness of their actions commenced in Mississippi be measured by the law of the state where the nuclear incident occurred. *In re TMI Cases Consolidated II*, No. 88-1452 slip op. (M.D. Pa. Aug. 16, 1993), App. at A-25, *aff'd*, 89 F.3d 1106 (3d Cir. 1996), App. at A-64.

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3. As of the effective date of the Amendments Act, plaintiffs' need for such "cover" was acute, since the trial court and intermediate appellate court in Pennsylvania had ruled that their claims were barred under Pennsylvania's two year statute. *In re TMI Litigation - Cases Consolidated II*, 107 Dauphin Cty. Rep. 255 (1987), *aff'd, In re TMI Litigation Cases Consolidated II - Appeal of James D. Carrigan*, Nos. 00426 & 00445 (Pa. Super. July 15, 1988).

4. The Pennsylvania state judgments had not achieved finality because the 30 day period for removal required defendants to act before the time for plaintiffs to seek review in the Pennsylvania Supreme Court had expired.

REASONS FOR DENYING THE WRIT

I. Petitioners' Central Argument In Support Of A Writ Of Certiorari Was Never Raised Below

Petitioners contend that "[t]he question at the heart of [the] petition is whether Congress expressed any intent by the choice of law provisions of the Amendments Act that the retroactive application of Pennsylvania's statute of limitations to all actions arising from the Three Mile Island ('TMI') accident, should be so broadly interpreted so as to result in a shortening of the statute of limitations" that would otherwise have applied to their Mississippi actions. Petition at 6-7. This question of interpretation was never raised by them in any of the proceedings below.

The statutory provision at issue is contained in § 20(b) of the Amendments Act. That provision expressly states that the choice of law provision contained in section 11 of the Amendments Act (codified at 42 U.S.C. § 2014(hh)) "shall apply to nuclear incidents occurring before, on or after the date of the enactment of this Act." Petitioners have never argued that that provision, mandating retroactive application of the choice of law provision to public liability actions filed prior to the Amendments Act, should be interpreted in any way other than to require the retroactive application of the Pennsylvania statute of limitations to any action arising out of the TMI accident. Indeed, the Third Circuit stated:

> The district court held that § 20(b) read in conjunction with § 11(b), compels retroactive application of Pennsylvania's two year statute of limitations to the causes of action brought by the plaintiffs, mandating the dismissal of the Mississippi state and federal cases as time barred. *In re TMI Litig. Cases Consol. II*, No. 88-1452, slip op. at 2-6 (M.D. Pa. Aug. 16, 1993). *Plaintiffs do not dispute this reading of the Amendments Act on appeal.*

89 F.3d at 1111, App. at A-69 (emphasis added). The court of appeals also explained:

> The district court held the language of § 20(b) is unambiguous and "by its very terms clearly requires the

> retroactive application of all of the provisions of § 11, including the choice of law provision." *In re TMI Litig. Cases Consol. II*, No. 88-1452, slip op. at 3 (M.D. Pa. Aug. 16, 1993). *Although plaintiffs have not challenged the district court's reading of the Amendments Act on appeal*, we exercise plenary review of the district court's construction of the Act. . . .

89 F.3d at 1111-12, App. at A-70 (emphasis added, citation omitted). *See also Id.* at 1112 n.6, App. at A-72 n.6 ("Finally, we note that plaintiffs have not argued that § 20(b) is ambiguous or that it exempts statutes of limitations from retroactive application.").

To the extent that Petitioners rely on an argument never previously raised by them in support of their Petition for certiorari review, the Petition should be denied. *Holly Farms Corp. v. National Labor Relations Bd.*, 116 S.Ct. 1396, 1402 n.7 (1996) ("Because we generally do not address arguments that were not the basis for the decision below . . . we decline to entertain Holly Farms' . . . argument.") (citation omitted); *Matsushita Elec. Indus. Co., Ltd. v. Epstein*, 116 S.Ct. 873, 880 n.5 (1996) ("While it is true that a respondent may defend a judgment on alternative grounds, we generally do not address arguments that were not the basis for the decision below.") (citation omitted); *United States v. Williams*, 504 U.S. 36, 40 (1992) ("Our traditional rule . . . precludes a grant of certiorari only when the question presented was not pressed or passed upon below.") (quotation and citation omitted).

II. There Is No Reason To Review The Court Of Appeals' Interpretation Of Congress' Intent Regarding The Choice Of Law Provision In The Amendments Act

Petitioners suggest that Congress did not intend, by the rules of decision provision, to retroactively change any limitations period that might otherwise apply to their claims. Petition at 6-7. Apart from the fact that no such interpretive argument was advanced below, the argument does not warrant review, since it has already been decided by this Court.

The choice of law provision contained in the Amendments Act was patterned after a similar provision contained in

the Outer Continental Shelf Lands Act, 43 U.S.C. § 1331. *See* H.R. Rep. No. 104, 100th Cong., 1st Sess., pt. 1, at 18 (1987); *In re TMI Cases Consolidated II*, 940 F.2d 832, 855-56 (3d Cir. 1991) ("Congress adopted the approach to state law embodied in the Outer Continental Shelf Lands Act."), *cert. denied sub nom. Gumby v. General Public Util. Corp.*, 503 U.S. 906 (1992) ("*TMI II*"). The Lands Act choice of law provision has consistently been interpreted as requiring the incorporation of the adjacent state's substantive law as federal law. *See Gulf Offshore Co. v. Mobil Oil Corp.*, 453 U.S. 473, 480-81 (1981); *Rodrigue v. Aetna Casualty & Surety Co.*, 395 U.S. 352, 357 (1969). This Court has held that the state substantive law so incorporated includes the adjacent state's statute of limitations. *Chevron Oil Co. v. Huson*, 404 U.S. 97, 102-4 (1971). The same rule applies to cases begun in forums outside the adjacent state. *Bonner v. Chevron U.S.A.*, 668 F.2d 817, 819 (5th Cir. 1982).

Given the legislative history of the Amendments Act choice of law provision, and the decisions of this Court treating statutes of limitations as "substantive rules" in the context of such a choice of law provision, the Third Circuit's application of the choice of law provision of the Amendments Act to include the limitations law of Pennsylvania is hardly novel. The opinion below does not conflict with the decisions of this Court or other circuits, which uniformly regard "substantive rules of decision" as including limitations laws.

III. There Is No Constitutional Issue Warranting Review, Because The Decision Below Is Consistent With The Prior Decisions Of This Court And Other Courts Of Appeals

Petitioners claim that review should be granted to correct an aberrant disregard of a constitutionally protected right to a period of limitations affecting their tort suits. To the contrary, the opinion below does not conflict with the decisions of this Court or other courts of appeals regarding the constitutionality of the retroactive application of statutes affecting pending actions.

The precedent in this Court firmly establishes that a plaintiff has no vested right in a cause of action. Rather, any "property" interest in a tort action is merely an inchoate possibility. *See, e.g., Duke Power Co. v. Carolina Environmental Study Group, Inc.*, 438 U.S. 59, 88 n.32 (1978) (person has no property, no vested interest, in any rule of common law); *Smallwood v. Gallardo*, 275 U.S. 56, 61 (1927) (plaintiffs, whose actions to enjoin the collection of illegal taxes were dismissed as a result of subsequently enacted federal legislation, had no vested right to an injunction and the filing of suits for same did not create one); *United States v. Heinszen & Co.*, 206 U.S. 370, 387 (1907) (bringing an action does not create a vested right in a particular outcome; therefore filing of action cannot divest government of the right to enact curative legislation).

The courts of appeals have applied this precedent consistently. *See, e.g., Arbour v. Jenkins*, 903 F.2d 416, 420 (6th Cir. 1990) (retroactive application of a statute to pending litigation not unconstitutional, because a legal claim affords no enforceable property right until reduced to final judgment); *Sowell v. American Cyanamid Co.*, 888 F.2d 802, 805 (11th Cir. 1989) (same); *Eddings v. Volkswagenwerk, A.G.*, 835 F.2d 1369, 1374 (11th Cir.) (plaintiff has no vested interest in rule of law), *cert. denied*, 488 U.S. 822 (1988); *In re Consolidated U.S. Atmospheric Testing Litig.*, 820 F.2d 982, 989 (9th Cir. 1987) ("A cause of action is property of a substantially different nature than real or personal property or vested intangible rights. It is inchoate and affords no definite or enforceable property right until reduced to final judgment."), *cert. denied sub nom. Konizeski v. Livermore Labs*, 485 U.S. 905 (1988); *Hammond v. United States*, 786 F.2d 8, 12 (1st Cir. 1986) (plaintiff does not have a vested right in a tort cause of action until there is a final unreviewable judgment); *Ducharme v. Merrill-National Laboratories*, 574 F.2d 1307, 1309 (5th Cir.), *cert. denied*, 439 U.S. 1002 (1978) (plaintiff has no vested right in tort claim for damages under state law). *See also TMI II*, 940 F.2d at 861 (rejecting plaintiffs' constitutional challenges to retroactive application of the jurisdictional provisions of the Amendments Act). The Third Circuit did not depart from these long stand-

ing principles in this case. 89 F.3d at 1113, App. at A-72 ("Under the United States Constitution, legislation affecting a pending tort claim is not subject to 'heightened scrutiny' due process review because a pending tort claim does not constitute a vested right.").

The well settled principle established by this Court, that the retroactive character of a statute comports with the constitutional mandate of due process if it constitutes a rational means of serving a legitimate congressional purpose, *see Pension Benefit Guaranty Corp. v. R.A. Gray & Co.*, 467 U.S. 717, 729-30 (1984), *Usery v. Turner Elkhorn Mining Co.*, 428 U.S. 1, 15-19 (1976), guided the Third Circuit's determination below. The court of appeals' constitutional analysis is not in conflict with the decisions of this Court. Nor, as the court of appeals explained, is it in conflict with the decisions of other circuit courts:

> Other courts of appeals that have recently addressed the constitutionality of retroactive legislation that either abolishes or substantially affects a plaintiff's pending tort cause of action have reviewed such legislation on a "rational basis" standard. *See, e.g., In re U.S. Atmospheric Testing Litig.*, 820 F.2d 982, 990-91 (9th Cir. 1987) (plaintiff challenging retroactivity bears the burden of showing that the legislature acted in arbitrary, irrational way), *cert. denied sub nom. Konizeski v. Livermore Labs*, 485 U.S. 905 (1988); *see also Hammond*, 786 F.2d at 13.

89 F.3d at 1113, App. at A-72-73. *See also Arbour v. Jenkins*, 903 F.2d 416, 420 (6th Cir. 1990); *Sowell v. American Cyanamid Co.*, 888 F.2d 802, 805 (11th Cir. 1989). *See generally O'Conner v. Commonwealth Edison Co.*, 13 F.3d 1090, 1102 (7th Cir.), *cert. denied*, 114 S.Ct. 2711 (1994); *TMI II*, 940 F.2d at 860.

Petitioners misstate the import of this consistent line of appellate authority by suggesting that "[i]n neither *TMI II* nor the cited cases did the courts interpret the congressional intent in a manner that resulted in the arbitrary and irrational consequence of a complete retroactive dismissal that plaintiffs now suffer." Petition at 10. To the contrary, the retroactive

application of legislation resulting in dismissal of pending claims has been considered and upheld when, as here, retroactivity is rationally related to legislative objectives. *See, e.g., Hammond*, 786 F.2d 8 (1st Cir. 1986) (retroactive application of federal statute requiring substitution of United States as defendant held constitutional, despite result that plaintiff's complaint then dismissed for failure to have filed an administrative claim under Federal Torts Claims Act); *Arbour*, 903 F.2d 416 (6th Cir. 1990) (Westfall Act, requiring substitution of United States as defendant, held constitutional even though retroactive application of Act resulted in dismissal of pending cause of action for failure to exhaust administrative remedies); *In re Consol. Atmospheric Testing Litig.*, 820 F.2d 982 (9th Cir. 1987) (retroactive application of federal statute requiring substitution of United States as defendant not unconstitutional, even though plaintiffs' cause of action subsequently dismissed by application of defenses unique to United States); *Eddings v. Volkswagenwerk, A.G.*, 835 F.2d 1369 (11th Cir. 1988) (suit commenced when statute of repose had been declared unconstitutional was subject to dismissal pursuant to subsequent decision holding statute of repose valid). Thus, in all of these cases, the plaintiffs *were* left without a remedy. But the retroactive application of the statute causing that result was not unconstitutional, since the courts of appeals consistently analyzed the legislation as comporting with due process requirements established in the precedents of this Court.

The court below correctly concluded that the retroactive application of the Amendments Act's choice of law provision is not arbitrary or irrational. Its conclusion is in accord with the courts of appeals that have addressed the same or similar issues.

Congress enacted the Amendments Act "to effect uniformity, equity, and efficiency in the disposition of public liability claims" arising from nuclear accidents:

> By creating this federal program which requires the application of federal law, Congress sought to effect uniformity, equity and efficiency in the disposition of public liability claims. With the federal jurisdiction and removal provisions set forth in the Amendments Act, Congress

> ensured that all claims resulting from a given nuclear incident would be governed by the same law, provided for the coordination of all phases of litigation and the orderly distribution of funds, and assured the preservation of sufficient funds for victims whose injuries may not become manifest until long after the incident.

TMI II, 940 F.2d at 857. *See* H.R. Rep. No. 104, 100th Cong., 1st Sess., pt. 1 at 18 (1987) ("These measures stem from the desire of Congress for the equitable and uniform treatment of victims of a nuclear accident"); *accord O'Connor v. Commonwealth Edison Co.*, 13 F.3d 1090, 1102 (7th Cir.) (retroactive application of removal provision in Amendments Act furthers goals of equal treatment of victims and avoidance of inconsistent results), *cert. denied*, 114 S.Ct. 2711 (1994).

A uniform limitations period applicable to all claims arising out of a particular nuclear incident is a rational means of furthering Congressional intent to ensure equitable and uniform treatment of nuclear accident victims. Uniform treatment of claimants is not possible if some claimants are subject to a two-year limitation period, while others are accorded the benefit of a six-year period, depending on the tactic of plaintiffs' counsel in instituting duplicative suits in a distant forum.

The goal of uniformity was to *eliminate* "the possibility of inconsistent outcomes." *TMI II*, 940 F.2d at 861. But that possibility is precisely what petitioners seek here. Petitioners wish to have the timeliness of their actions determined not according to a uniform rule for all TMI accident litigants, but instead by a longer rule of their choosing, thus resulting in disparate treatment of similarly situated plaintiffs. This is not what Congress intended.[5]

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5. Petitioners cite to *Ferens v. John Deere Co.*, 494 U.S. 516, 530- 31 (1990), for the proposition that they had a right to rely on the application of the statute of limitations applicable in the forum in which suit was commenced. Petition at 13. But *Ferens* is solely a product of jurisprudence developed under 28 U.S.C. § 1404. At issue here is the explicit directive of Congress that the federal rules of decision are to be derived from the law of the state in which the nuclear incident occurred. The choice of law questions that apply to a case transferred pursuant to § 1404 have no applicability to the constitutionality of the express choice of law provision contained in the Amendments Act, 42 U.S.C. § 2014(hh).

Retroactive application of the choice of law provision is also a rational means to further equitable treatment of public liability plaintiffs. It is not inequitable to hold a plaintiff in Pennsylvania to Pennsylvania's limitations period for a cause of action arising in Pennsylvania out of a facility located in Pennsylvania. As the Third Circuit concluded, "retroactive application advances equity by applying the same law to all similarly situated plaintiffs and eliminating inconsistent results." 89 F.3d at 1113, App. at A-73.

Retroactive application of the choice of law provision is also a rational means to promote efficiency because, as the court of appeals explained, that provision supports the constitutional exercise of federal jurisdiction over pending public liability actions, thus allowing for their consolidation and administration in one forum. *See* 89 F.3d at 1114-15, App. at A-73-75.

For the foregoing reasons, the court of appeals correctly concluded that

> [b]ecause retroactive application of the choice of law provision to pending causes of action advances Congress' goal of uniformity, equity and efficiency in the disposition of claims arising from nuclear accidents, it is not arbitrary and irrational. Plaintiffs have not demonstrated retroactive application violates constitutional due process. *Cf. O'Conner v. Commonwealth Edison Co.*, 13 F.3d at 1102 (retroactive application of Amendments Act not arbitrary and irrational); *In re TMI Litig. Cases Consol. II*, 940 F.2d at 860-61 (same).

89 F.3d at 1115, App. at A-75-76.

The Third Circuit's analysis in these cases is consistent with the decisions of this Court and other courts of appeals. There is no conflict of authority warranting this Court's review.[6]

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6. Nor is there any conflict with the decisions of this Court regarding "a constitutional right to a grace period." Petition at 11. Petitioners cite *Block v. North Dakota, ex rel. Board of University and Sch. Lands*, 461 U.S. 273

IV. The Decision Below Does Not Raise An Important Federal Question Requiring This Court's Review

Section 20(b) of the Amendments Act expressly provides that the choice of law provision is to be given retroactive effect so that it applies to cases pending at the time of enactment. Thus, this case does not raise any issue of statutory construction comparable to those considered in *Landgraf v. USI Film Products*, 114 S.Ct. 1483 (1994), or to be considered in connection with this Court's review of *United States ex rel. Schumer v. Hughes Aircraft Company*, 63 F.3d 1512 (9th Cir. 1995), *cert. granted*, 117 S.Ct. 293 (1996). Both of those cases involve determinations of whether legislation should be applied retrospectively "in the absence of an instruction from Congress." *Landgraf*, 114 St.Ct. at 1496.

Here Congress has expressly and unambiguously addressed the question. In such a case, "there is no need to resort to judicial default rules," *Landgraf*, 114 S.Ct. at 1505, considered important for this Court's review in the cited cases. The only question is whether the constitution bars Congress' specific directive to apply the legislation retroactively. That question has been answered authoritatively by this Court in earlier cases and, therefore, does not require further review.

(1983), and *Texaco, Inc. v. Short*, 454 U.S. 516 (1982), for the proposition that the legislature must allow a reasonable time before a statute shortening a limitations period takes effect. Petition at 11-12. But, as the district court correctly concluded, the cited cases involved "vested rights." *See Block*, 461 U.S. at 286 (dispute between United States and North Dakota regarding rights to real property); *Texaco*, 454 U.S. at 527 (dispute over termination of dormant mineral rights).

> Recent cases have clearly distinguished these "vested rights" cases from those involving personal injury or tort claims. In *Hammond v. United States*, 786 F.2d 8 (1st Cir. 1986), the First Circuit stated that
>
> > because [in vested rights cases] the rights had 'vested' in real property, a contract, or in a fixed sum, they were said to stand independent of the statute that created them and could not be abridged by the subsequent statute. In none of these cases was any right to a tort cause of action, or a right deriving from a tort, held to be vested.
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> *In re TMI Litig. Cases Consol. II*, slip op. at 8-9 (M.D. Pa. Aug. 16, 1993), App. at A-30.

The court below followed that directive, as have the decisions of other courts of appeals facing similar questions. This Court has not considered those decisions to raise important federal questions warranting review. *See O'Conner v. Commonwealth Edison Co.*, 13 F.3d 1090 (7th Cir.), *cert. denied*, 114 S.Ct. 2711 (1994); *In re TMI Litig. Cases Consol. II*, 940 F.2d 832 (3d Cir. 1991), *cert. denied sub nom. Gumby v. General Pub. Utils. Corp.*, 503 U.S. 906 (1992); *In re Consolidated U.S. Atmospheric Testing Litig.*, 820 F.2d 892 (9th Cir. 1987), *cert. denied sub nom. Konizeski v. Livermore Labs*, 485 U.S. 905 (1988). The federal question is well settled. Further review would not be instructive.

Nor would review likely affect any other cases. While there were numerous other TMI cases subject to the bar of the Pennsylvania statute of limitations in cases originally filed in Mississippi courts, all of those cases have been dismissed by summary judgment on the merits. *In re TMI Cases Consolidated II*, 927 F. Supp. 834 (M.D. Pa. 1996), appeal pending. No remaining TMI case involves the question raised here because all of the remaining cases were filed only in Pennsylvania. None is a "protective" action filed in a distant forum with a longer statute of limitations.

Nor is counsel aware of any other public liability actions, arising out of other nuclear incidents, commenced prior to the 1988 enactment of the Amendments Act, in distant forums, to take advantage of that distant forum's longer statute of limitations. The issue presented by the retroactive application of the Amendments Act here is unique to the circumstances of the TMI litigation, in which the entire question is virtually moot. For that reason as well, the petition does not present federal questions of continuing importance requiring further review.

CONCLUSION

For all of the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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